Original

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Kathleen Jansen, P.J, Jessica R. Cooper and Patrick M. Meter, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant.

v

JOHN ALBERT GILLIS

Defendant-Appellee.
_____/

Supreme Court No. 127194

Court of Appeals No. 245012

Circuit Court No. A-02-601-FC

BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

Submitted by:

STATE APPELLATE DEFENDER OFFICE

By: **JACQUELINE J. McCANN (P58774)**
Assistant Defender

and

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

By: **JOHN R. MINOCK (P24626)**
Chair of Amicus Committee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

MISCELLANEOUS

STATEMENT OF JURISDICTION

The State Appellate Defender Office and the Criminal Defense Attorneys of Michigan accept that this Honorable Court has jurisdiction over this matter.

STATEMENT OF QUESTIONS PRESENTED

I. **THE PLAIN LANGUAGE OF MCL 750.316 DOES NOT PERMIT A CONVICTION FOR FIRST-DEGREE MURDER "IN THE PERPETRATION OF" A HOME INVASION, WHERE THE HOMICIDE OCCURS SEVERAL MILES AWAY FROM THE HOME AND SEVERAL MINUTES AFTER THE DEFENDANT HAS LEFT THE DWELLING? DOES THE TRANSACTIONAL APPROACH STRAY FROM THE PLAIN LANGUAGE OF THE STATUTE?**

Amicus Curiae answers, "Yes".

II. **THE COURT OF APPEALS DID NOT VIOLATE THE SEPERATION OF POWERS DOCTRINE IN PRECLUDING RETRIAL ON THE FELONY MURDER CHARGE?**

Amicus Curiae answers, "Yes".

STATEMENT OF FACTS

The following general fact summary is based upon the Court of Appeals' Opinion: Defendant Gillis broke into Steven Albright's home in the afternoon. Mr. Albright confronted Defendant and Defendant fled from the home, got in his vehicle, and drove away. Mr. Albright tried to follow Defendant at first, but returned home and called 911. Several minutes later, a state police trooper spotted Defendant's vehicle, being driven in a normal manner, on the interstate highway. The trooper followed Defendant's vehicle and tried to effectuate a stop. At first, Defendant slowed and pulled over to the shoulder, but then drove off at a high rate of speed. Other law enforcement officers joined the pursuit, which went from the highway, to a neighborhood, and then back to the highway, this time traveling in the wrong direction. Eventually, Defendant collided head-on with a vehicle traveling in the right direction, killing its occupants. Defendant was convicted of two counts of felony murder, MCL 750.316(1)(b), with the home invasion as the underlying felony. People v John Albert Gillis, unpublished per curiam opinion of the Court of Appeals, decided August 17, 2004 (Docket No. 245012), pp 1-2.

The Court of Appeals vacated the felony murder convictions. Id. at 1. The Court held that the deaths were not connected with the home invasion in time, place, or causal relationship, but rather were immediately connected with Defendant's act of fleeing and eluding, a felony, but not one enumerated in the felony murder statute. Id. at 3-4. The Court remanded for a new trial on charges of 2nd degree murder, the lesser-included involuntary manslaughter, and fleeing and eluding.[1] Id. at 4-5.

[1] The Court of Appeals also found reversible error in the trial court's refusal to instruct on involuntary manslaughter. Id. at 4-5. The Court also found error in the admission of evidence of prior bad acts. Id. at 5-6. The Court did not find this evidentiary error to be cause for reversal in itself, but presumably on retrial, the admission of the prior bad act evidence would be precluded.

This Honorable Court granted the Prosecutor leave to appeal and directed the parties to include the following among the issues to be briefed: "1) whether the plain language of MCL 750.316 permits a conviction for first-degree murder 'in the perpetration of' a first or second-degree home invasion where the homicide occurs several miles away from the dwelling and several minutes after the defendant has left the dwelling; and 2) whether, under the separation of powers doctrine, the Court of Appeals had the authority to direct the circuit court, on remand, to limit the charges on retrial to those that the Court of Appeals determined should have 'properly' been brought." This Court invited the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan to file briefs amicus curiae.

I. THE PLAIN LANGUAGE OF MCL 750.316 DOES NOT PERMIT A CONVICTION FOR FIRST-DEGREE MURDER "IN THE PERPETRATION OF" A HOME INVASION, WHERE THE HOMICIDE OCCURS SEVERAL MILES AWAY FROM THE HOME AND SEVERAL MINUTES AFTER THE DEFENDANT HAS LEFT THE DWELLING. THE TRANSACTIONAL APPROACH STRAYS FROM THE PLAIN LANGUAGE OF THE STATUTE.

Introduction

The plain language of MCL 750.316 does not permit a conviction for first-degree murder where the homicide was committed during the escape or flight from an enumerated felony after the defendant has left the immediate scene of the crime. Our courts have strayed from the statutory language in embracing the transactional approach to felony murder. This Court should reject the transactional approach. If this Court adopts the transactional approach, it should be narrowly applied and this Court should still affirm the Court of Appeals in the instant case.

Standard of Review

This Court reviews issues of statutory interpretation de novo. People v Barbee, 470 Mich 283, 285, 681 NW2d 348 (2004); People v Krueger, 466 Mich 50, 53, 643 NW2d 223 (2002).

The Plain Language of the First-Degree Murder Statute

Michigan's first-degree murder statute, MCL 750.316, provides in relevant part that:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> (a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.
>
> (b) **Murder committed in the perpetration of, or attempt to perpetrate**, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled

> substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, or vulnerable adult abuse in the first and second degree under section 145n.[2] (Emphasis added).

Michigan has had a First-Degree Murder statute since 1846 and the substantive language that makes up current subsections (1)(a) and (1)(b) of MCL 750.316 has not changed much, except for periodic addition to the enumerated felonies in subsection (b).[3] The first murder statute, from 1846, provided:

> All **murder** which shall be perpetrated by means of poison or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which shall be **committed in the perpetration or attempt to perpetrate** any arson, rape, robbery or burglary shall be deemed murder in the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life. [1846 Mich Rev Stat, title xxx, "Of Crimes and the Punishment Thereof", ch 153, § 1, as quoted in People v Couch, 436 Mich 414, 418, 461 NW2d 683 (1990).]

The statute did not codify the common law felony-murder doctrine. People v Aaron, 409 Mich 672, 717-729, 299 NW2d 304 (1980).

The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. People v Morson, 471 Mich 248, 255, 685 NW2d 203 (2004). The most relevant starting point for discerning legislative intent lies in the plain language of the statute in question, i.e. the words of the statute itself supplies the most reliable source of the Legislature's

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[2] Defendant Gills was convicted for acts that occurred in 2001. In 2004, the Legislature added "vulnerable adult abuse in the first and second degree under section 145n" to the list of enumerated felonies that will support a first-degree murder conviction in MCL 750.316(1)(b).

[3] In 1994, a third theory of 1st-degree murder was added to the statute. (See Historical Notes.) Subsection (1)(c) provides that a person is guilty of first-degree murder for "[a] murder of a peace officer or a corrections officer committed while the peace officer or corrections officer is lawfully engaged in the performance of any of his or her duties as a peace officer or corrections officer, knowing that the peace officer or corrections officer is a peace officer or corrections officer engaged in the performance of his or her duty as a peace officer or corrections officer."

intent. Shinholster v Annapolis Hospital, 471 Mich 540, 549, 685 NW2d 275 (2004). If the language used by the Legislature is clear and unambiguous, courts must enforce the statute as written and follow its plain meaning, free of any judicial gloss.[4] Barbee, supra at 286; Morson, supra at 255; Shinholster, supra at 549; Morales v Auto-Owners Insurance Co, 469 Mich 487, 490 (2003). Courts must give the words of a statute their plain and ordinary meaning. People v Morey, 461 Mich 325, 329-330, 603 NW2d 250 (1999). The judicial role precludes imposing different policy choices than those made by the Legislature in the clear language of a statute. People v McIntire, 461 Mich 147, 152-153, 599 NW2d 102 (1999).

The statutory language "[m]urder committed in the perpetration of, or attempt to perpetrate" an enumerated felony by its common and ordinary meaning does not include the deaths in the instant case. Perpetrate is defined in ordinary English language as: "1) to perform, execute, or commit (a crime, wrong, etc.): *to perpetrate a murder.* 2. to carry out or enact (a prank, deception, etc.): *to perpetrate a hoax.* 3. to present, execute, or do in a poor or tasteless manner: *who perpetrated this farce.*"[5] Random House Dictionary of the English Language, unabridged, (1971 ed.). Similarly, Black's Law Dictionary, abridged, 7th ed. (2000), defines perpetrate as "[t]o commit or carry out (an act, esp. a crime) <find whoever perpetrated this heinous deed>." In the common and ordinary use of the English language, the victims in this

[4] A judge is not free to ignore or circumvent the plain language of a statute because he or she believes it will cause an "absurd result." See People v McIntire, 461 Mich 147, 155-160, 599 NW2d 102 (1999).

[5] Where the Legislature "has not expressly defined terms used within a statute," a reviewing court "may turn to dictionary definitions to aid [its] goal of construing those terms in accordance with their ordinary and accepted meanings." Morey, supra at 330.

case died in the perpetration of a Fleeing and Eluding, i.e. during a car chase, not in the perpetration of a Home Invasion.[6]

The Legislatures of some other states have chosen to include killings committed during escape or flight from a felony within the definition of felony murder, e.g. Arizona, Missouri, and New York. The statutes from these other jurisdictions illustrate that the bare phrase from Michigan's statute, "[m]urder committed in the perpetration of, or attempt to perpetrate" an enumerated felony, does not encompass murders committed during escape or flight away from the immediate scene.

Arizona's first-degree murder statute provides, in relevant part:

> A person commits first degree murder if: . . . 2. Acting either alone or with one or more other persons the person commits or attempts to commit [an enumerated felony] and in the course of and in furtherance of the offense **or immediate flight from the offense**, the person or another person causes the death of any person. [Arizona Revised Statutes § 7 § 13-1105(A) (Emphasis added.)]

Missouri's second-degree murder[7] statute provides, in relevant part:

> A person commits the crime of murder in the second degree if he: . . . (2) Commits or attempts to commit any felony, and in the perpetration or the attempted perpetration of such felony **or in the flight from the perpetration of or attempted perpetration of such felony**, another person is killed as a result of the perpetration or attempted perpetration of such felony **or immediate flight from the perpetration of such felony or attempted perpetration of such felony**. [Missouri Statutes 565.021 (Emphasis added.)]

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[6] This Court has held that the term "offense" does not equate with the term "transaction" and that to equate the two is at odds with the plain meaning and common understanding of the words. People v Nutt, 469 Mich 565, 591, 677 NW2d 1 (2004).

[7] Only premeditated murder is classified as first-degree murder in Missouri. Missouri Statutes 565.020.

Similarly, New York's murder statutes provides, in relevant part:

> A person is guilty of murder in the first degree when: 1. With intent to cause the death of another person, he causes the death of such person; and . . . the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of [an enumerated felony] **or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime** . . . [Consolidated Laws of New York, Ch. 40, Part 3, § 125.27 (Emphasis added.)]

> A person is guilty of murder in the second degree when: . . . 3. Acting alone or with one or more persons, he commits or attempts to commit [an enumerated felony] and in the course of and in furtherance of such crime **or of immediate flight therefrom**, he, or another participant, if there be any, causes the death of a person other than one of the participants; . . . [Consolidated Laws of New York, Ch. 40, Part 3, § 125.25 (Emphasis added.)]

Under the plain language of MCL 750.316(1)(b), Defendant Gillis was entitled to the relief that he received.

Straying from the Plain Language of the Statute: the Transactional Approach

The transactional approach to felony murder comes not from the statutory language but from the transactional approach to robbery. The case most cited as the basis for the transactional approach to felony murder in Michigan is People v Podolski, 332 Mich 508; 52 NW2d 201 (1952), a case in which it was unnecessary to invoke that approach to sustain the conviction and in which no statutory analysis was performed. After Podolski, the Court of Appeals routinely applied the transactional approach in felony murder cases in which *robbery* was the underlying enumerated felony.[8] Then, with People v Thew, 201 Mich App 78, 506 NW2d 547 (1993) and People v Gimotty, 216 Mich App 254, 549 NW2d 39 (1996), the Court of Appeals broadened the

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[8] See, e.g., People v Bowen, 12 Mich App 438, 441, 162 NW2d 911 (1969); People v Goree, 30 Mich App 490, 495, 186 NW2d 872 (1971); People v Smith, 55 Mich App 184, 185, 189, 222 NW2d 172 (1974); People v Oliver, 63 Mich App 509, 234 NW2d 679 (1975).

transactional approach to felony murder predicated on enumerated felonies beyond robbery, with little fanfare or discussion, to the point that it now seems that doctrine can be applied to all the enumerated felonies. This Court recently held that Michigan never even adopted the transactional approach for robbery, People v Randolph, 466 Mich 532; 648 NW2d 164 (2002), but it is still being applied in felony murder cases.

In Podolski, supra, the defendant, armed with a gun, and his accomplices robbed a bank and "were about to escape when the police officers arrived." Id. at 514. A gun battle ensued and a police officer was killed in the "immediate vicinity of the bank" by a bullet fired from another police officer's gun. Id. at 514. The defendant was convicted of first degree murder and, among other grounds, challenged whether the homicide was committed during the perpetration of the robbery. Id. at 517. This Court rejected the argument and quoted from Wharton, Law of Homicide (3d), p 186, which stated:

> 'A burglar may be said to be engaged in the commission of the crime of burglary while making away with the plunder, and while engaged in securing it. So, a robbery within the meaning of a rule that homicide committed in the perpetration of a robbery is murder in the first degree is not necessarily concluded by the removal of the goods from the presence of the owner; and it is not necessary that the homicide should be committed at the precise time and place of the robbery. As in the case of burglary, the robber may be said to be engaged in the commission of the crime while he is endeavoring to escape and make away with the goods taken. And a homicide committed immediately after a robbery, apparently for the purpose of preventing detection is within the rule.' Id. at 518-519.

This Court made no reference to the statute, MCL 750.316. This Court really did not need to invoke a transactional approach to this case as the robbers had not escaped the scene and the officer was killed as the robbers apparently tried to shoot their way out of the bank.

In People v Bowen, 12 Mich App 438, 441, 162 NW2d 911 (1969), the Court of Appeals did examine the language of MCL 750.316 and a dictionary definition of perpetrate, "to carry through." The Court concluded that the robbers were still perpetrating the robbery when one of them shot the victim, finding that "since the defendant and his partner were still in the bank it cannot be said that the entire contemplated robbery, *which would include escape*, was as yet carried through."[9] Id. at 440 (Emphasis added).

In People v Goree, 30 Mich App 490, 186 NW2d 872 (1971), the Court of Appeals sustained the felony murder conviction explaining:

> This Court has previously held that escape is part of the original felony [citing Bowen, supra] because getting away with the contraband is as essential to the execution of an armed robbery as the theft itself. The escape ceases to be a continuous part of the original felony when the escaping felon reaches a point of at least temporary safety (citation omitted) or is subject to 'complete' custody. (Citation omitted). Goree at 495.

Some of the cases applied the transactional approach to robbery in order to sustain felony murder convictions where a police officer was murdered by the robber while the officer was trying to apprehend the robber at a distance in both time and space from the actual robbery. See, e.g., Goree, supra; People v Oliver, 63 Mich App 509, 523-526, 234 NW2d 679 (1975). In Goree, it appears that a first degree murder conviction might have been sustainable as premeditated murder, MCL 750.316(1)(a), but the limited facts revealed in the opinion make that determination difficult. In Oliver, the defendant was actually convicted of first degree murder under both theories. Under our modern version of MCL 750.316 such murders would all be

[9] "The murder took place inside the bank." Id. at 440.

first-degree murder under subsection (1)(c), for the knowing murder of a peace officer or corrections officer lawfully engaged in his or her duties.[10]

The Court of Appeals has gone on to expand the transactional approach traditionally reserved for robbery to all of the enumerated felonies in the felony murder statute, MCL 750.316(1)(b), without really acknowledging that it was expanding the doctrine or discussing how or why it was doing so. See People v Thew, 201 Mich App 78, 506 NW2d 547 (1993) and People v Gimotty, 216 Mich App 254, 549 NW2d 39 (1996).

In Thew, supra at 84, the Court of Appeals chose to examine whether there was an adequate factual basis to support the defendant's guilty plea to felony murder, with the predicate felony being criminal sexual conduct, "[a]though defendant did not raise it as an issue".[11] The defendant had testified that he and the 11-year-old victim had sex about 15 to 20 minutes before defendant killed her by running her down with his car. The defendant claimed that the sex was consensual and that immediately afterward the two got into an argument. The defendant then "intentionally" drove his car into the victim and when she became stuck under his car he rocked the car back and forth several times to get his car free of her. Id. at 87. The defendant admitted that he had been afraid that the girl would tell on him. Id. at 88. The Court of Appeals believed that "inculpatory inferences can be drawn that he killed the victim to prevent detection" of the sex act. Id. at 88.

The Thew Court quoted from People v Smith, 55 Mich App 184, 189, 222 NW 2d 172 (1974) to sustain the felony murder plea:

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[10] See footnote 3, above.

[11] The trial court found a sufficient factual basis for felony murder but not for premeditated murder. Thew, supra at 80.

> '[I]f a murder is committed while attempting to escape from or prevent detection of **the felony**, it is felony murder, but only if it is committed as a part of a continuous transaction with, or is otherwise "immediately connected" with, **the underlying felony**.' [Thew, supra at 85-86, quoting Smith. (Emphasis added.)]

But Smith, supra, was simply one of the Court of Appeals' cases that applied the transactional approach in felony murder cases in which *robbery* was the underlying enumerated felony after Podolski. See footnote 7, above. The Smith Court actually found in the defendant's favor, but in doing so it cited Podolski, Bowen, and Goree and reiterated that: "A robber is engaged in the perpetration of the crime 'while he is endeavoring to escape and make away with the goods taken. And a homicide committed immediately after a robbery, apparently for the purpose of Preventing detection,' is felony murder." Smith, supra at 189.

The quote that the Thew Court took from Smith followed the discussion of the transactional approach in robbery. In the particular sentence quoted in Thew, the Smith Court simply used the more general terms "the felony" and "the underlying felony" rather than repeating more specifics terms like "the robbery" and "the underlying robbery".

Similarly, the Thew Court quoted from People v Goddard, 135 Mich App 128, 135-136, 352 NW2d 367 (1984), rev'd on other grounds 429 Mich 505, 418 NW2d 881 (1988):

> 'Michigan courts have held that a homicide qualifies as a felony murder if it is committed while a defendant is attempting to escape from or prevent detection of **the felony** and if it is immediately connected with **the underlying felony**. **People v Podolski**, 332 Mich 508, **518**, 52 NW2d 201 (1952); **People v Smith**, 55 Mich App 184, **189**, 222 NW2d 172 (1974). . . .' [Thew, supra at 86, quoting Goddard. (Emphasis added.)]

As discussed above, the Smith Court, relied on in Goddard, was simply using the more general terms "the felony" and "the underlying felony" in a particular sentence rather than repeating more specifics terms like "the robbery" and "the underlying robbery" following a

discussion of the transactional approach to robbery. As for Goddard's citation to Podolski in using the general terms felony and underlying felony, Goddard over generalized Podolski's very specific references to the offenses of robbery and burglary.

In People v Gimotty, 216 Mich App 254, 258-259, 549 NW2d 39 (1996), the Court of Appeals applied the transactional approach to the underlying felony of shoplifting (a larceny of any kind). After the co-defendant had shoplifted some dresses out of a retail store and returned to the defendant's car, the defendant drove out of the parking lot and onto a main road. Another driver observed them and notified the police on his cellular phone. Id. The other driver followed defendant's car until the police arrived and "a high-speed police chase" ensued. Id. at 259. Eventually defendant's car struck another vehicle while running a red light and one of that vehicle's occupants was killed. Id. at 256. Relying on the transactional approach, citing People v Turner, 120 Mich App 23, 328 NW2d 5 (1982),[12] Oliver, supra, and Goree, supra, the Court of Appeals held that the defendant had not reached a place of temporary safety and upheld the felony murder conviction.[13]

More recently, in People v Randolph, 466 Mich 532, 540, 648 NW2d 164 (2002), this Court held that it had never adopted the transactional approach to robbery. This Court overruled the Court of Appeals' adoption of the transactional approach, finding that the doctrine had no support in the common law or statute and labeling the concept that a robbery is not complete until a defendant reaches a point of temporary safety a fiction. Id. at 540-541. This Court expressly overruled Turner, which the Court of Appeals relied on in Gimotty. Id. at 541, 546.

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[12] Turner was a robbery case, but not a felony murder case. This Court overruled Turner in People v Randolph, 466 Mich 532, 541-546 648 NW2d 164 (2002).

[13] This Court has since "emphasize[d] that larceny is complete when the taking occurs. The offense does not continue." Randolph, supra at 543.

In Randolph, this Court discussed Podolski, writing that it had not based the felony murder conviction in Podolski on the transactional approach, but rather on the inherent danger in robbery or burglary which should make any death that results a foreseeable consequence. Randolph, supra at 549-550. Podolski was a pre-Aaron case[14] and the quoted language dealt with whether the defendant had "the murderous intent", i.e. whether there was malice, necessary to sustain the conviction. Podolski, supra at 514-517.[15] Whether the death was committed during the perpetration of the robbery was addressed later in the opinion. Podolski, supra at 517-518.

This Court should reject the transactional approach to felony murder as it rejected the transactional approach to robbery. The doctrine and the judicial expansion of the doctrine cast a very wide net, far beyond the plain meaning of the statutory language. "While it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring the principles underlying our system of criminal law." Aaron, supra at 710. It would be quite a challenge to find a non-lawyer, or even a lawyer who does not practice criminal law, who would say that the decedent in Gimotty was killed in the commission of a shoplifting or that the decedent in the instant case was killed in the commission of a home invasion. Both were killed in the commission of a fleeing and eluding offense.

Even the dissenting Justices in Randolph, who wanted to adopt the transactional approach to robbery, defined it in a narrower manner than the Court of Appeals has been applying it. Randolph, supra, dissenting opinion, at 563, 565. The Dissent wrote that: "The concept of

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[14] In People v Aaron, 409 Mich 672, 721, 746-747, 299 NW2d 304 (1980), this Court held that by the plain meaning of the statute the commission of the underlying felony alone did not satisfy the malice element of murder.

[15] See People v Tillman, 80 Mich App 16, 30-31, 263 NW2d 586 (1977), rev'd on other grounds 411 Mich 982, 308 NW2d 110 (1981), for a discussion of Podolski.

'temporary safety' describes the point beyond which the property is no longer in the presence of the victim. Practically, the perpetrator has escaped." Id. at 563 n 9. In Goree, Oliver, and Gimotty, the property was no longer in the presence of the victim of the underlying felony and the Court of Appeals still sustained the felony murder convictions under the transactional approach.[16] In the instant case, Defendant Gillis obtained no property and he was not in the presence of the victim of the home invasion when the vehicular homicides occurred.

If this Court does adopt a transactional approach to felony murder under MCL 750.316(1)(b), Amicus urges this Court to apply it narrowly and still affirm the vacation of Gillis' felony murder convictions. If it is to be applied, the transactional approach should only sustain felony murder convictions for murders committed in the presence of the victim of the underlying enumerated felony in furtherance of that offense. Alternatively, it should only apply to murders committed in hot pursuit from the enumerated felony with no break like the breaks that occurred in Gimotty and the instant case, where the perpetrators were no longer in the presence of the victim when the police pursuit began some time and distance from the scene of the underlying enumerated felony.

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[16] Again, it should be noted that Gimotty was a retail fraud case, not a robbery case.

II. THE COURT OF APPEALS DID NOT VIOLATE THE SEPERATION OF POWERS DOCTRINE IN PRECLUDING RETRIAL ON THE FELONY MURDER CHARGE.

Standard of Review

This Court reviews questions of constitutional law de novo. People v Nutt, 469 Mich 565, 573, 677 NW2d 1 (2004).

Discussion

The Court of Appeals concluded that Defendant Gillis could not be convicted of felony murder, MCL 750.316(1)(b) when it applied the law to the facts of this case. The Court of Appeals implicitly found that there was insufficient evidence. The Court of Appeals explained that it did not need to reach the sufficiency issue, since it found that the case should not have even survived the motion to quash. People v John Albert Gillis, unpublished per curiam opinion of the Court of Appeals, decided August 17, 2004 (Docket No. 245012), p 2, 2 n 2. Since the facts clearly would not support a first-degree murder conviction under subsections (1)(a) [premeditated murder] or (1)(c) [murder of a peace officer] either, the highest charges related to the deaths that could be sustained are Second-degree Murder and Fleeing and Eluding Causing Death.

It would violate the constitutional prohibition against Double Jeopardy to retry Gillis on Felony Murder, MCL 750.316(1)(b). See People v Randolph, 466 Mich 532, 552, 648 NW2d 164 (2002). Absent the Court of Appeals' ruling that Gillis was entitled to a new trial because the trial court failed to instruct on involuntary manslaughter, the proper remedy would be remand for entry of a conviction of second-degree murder because the jury's decision necessarily included a finding that the defendant had committed the elements of Second-Degree Murder. See Randolph, supra at 552, 552 n 25.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, the **STATE APPELLATE DEFENDER OFFICE** and the **CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN** ask this Honorable Court to affirm the Court of Appeals' decision.

Respectfully submitted,

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